

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1082

To be argued by
JONATHAN J. SILBERMANN

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIE MAE MCGIRTH,

Defendant-Appellant.

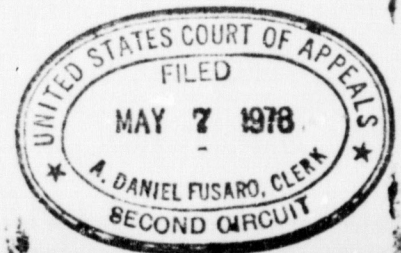
Docket No. 76-1082

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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QUESTION PRESENTED

Whether the improper and prejudicial rebuttal testimony
of the Postal Inspector requires reversal.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Mark A. Costantino) entered on February 20, 1976, after a jury trial, convicting Willie Mae McGirth of knowingly and unlawfully converting to her own use \$470 which she received in the execution of her employment as a Postal Service employee (18 U.S.C. §1711).

Appellant was sentenced to the custody of the Attorney General for three years. Execution of sentence was suspended and appellant was placed on probation for that period. Appellant was also required to pay a fine of \$490, to be paid within one year.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Willie Mae McGirth was an employee of the Postal Service from October 1968 until April 1975 (143¹). In the

¹ Numerals in parentheses refer to pages of the transcript of the trial.

course of a postal investigation of the theft in March 1975 of a letter containing registry funds² from the Steinway Street Post Office in Queens, New York, an audit of appellant's fixed accounts³ at that post office and the Sunnyside and Broadway Post Offices in Queens (18, 78-79) was conducted. The audit showed that appellant's accounts did not balance, indicating a shortage of either cash or stamps (86-87). Because of the shortage (16), on April 7, 1975, appellant was interviewed by three postal inspectors (16, 36, 38).

The interrogation began at approximately 10:30 a.m.⁴ (38) and ended at 3:00 p.m.⁵ The first two hours of questioning centered around the theft of the registry letter and the shortage in appellant's accounts (18, 39). As a result of this interrogation, appellant signed a written statement. Explaining

² At trial, registry funds were defined as excess monies received from transactions between postal employees and the public (15-16). Counsel for the Government and appellant agreed, in a stipulation read to the jurors, that "there is no evidence linking Mrs. McGirth to the stolen registry letter" (76).

³ A fixed credit is a draw assigned to a postal employee, used by the employee to sell stamps and make change (78).

⁴ Prior to the interrogation appellant was advised of her constitutional rights, as required by Miranda v. Arizona, 384 U.S. 436 (1966), and she signed a waiver form (Government Exhibit #1).

⁵ During the first two hours of the interview, Inspectors Booker and Mullin questioned appellant. After Booker left at 12:30 p.m., Inspector Garofalo replaced him (39). Lillian Razzis, a female employee of the Post Office, was present during appellant's entire interrogation, but did not participate in any questioning (37-38, 88, 132).

that she did a check on the auditors who were examining her accounts, appellant stated:

The reason I was short at Steinway and Sunnyside was because I knew my stock was going to be checked and since there had been a number of shortages at the station I wanted to make sure what I had taken out was the correct amount missing. I took \$155.65 out of Steinway on March 24th, 1975, placed it in a sealed envelope with the date. I left the bag in the ladies' room along with some personal articles I had. I returned the \$155.65 on April 7th, 1975, when I found out they had counted my stock. The \$225.00 at Sunnyside was taken on March 26th, 1975, placed in a sealed envelope. I carried it with me since the 26th of March, 1975. I do not know why I am short \$89.53 at the Broadway Station. I had no intention of stealing this money, just to make sure when my stock was checked it would come out to the amount I had put away. The \$155.65 has been restored at Steinway Station. I tried to replace the \$225.00. They said I couldn't until I talked to the inspectors.

This two-page statement is the truth.

(43-45).

As a result of continued interrogation,⁶ at 3:00 p.m. appellant signed a second written statement, which reads in part:

⁶After appellant signed the first statement, she started to leave the room in which the interviews had occurred. Before leaving, appellant took an envelope from her purse (45-46) and told the inspectors that the envelope contained the money she had received on March 26 from the fixed credit at the Sunnyside Post Office (45-92, 145). Across the envelope was written "\$225" and "March 26" (46, 165). Appellant then counted the money contained in the envelope, which amounted not to \$225, but to \$120 (46). The inspectors questioned appellant further (46, 95).

... I was asked questions by Inspector Mullins and I gave him statements, but that statement wasn't true. At Sunnyside and Steinway Station and Broadway I took money a little at a time, amount \$85.70. Since this time I have replaced \$155.65 at Steinway and \$120.00 at Sunnyside Stations. I used the money for my personal use.

This two-page statement is the truth to the best of my knowledge.

(52).

Further, appellant indicated that her previous statement was untrue. However, she explained the statement as having been made because of her fear that she would be accused of stealing the registry letter (53).

Two days after appellant's interrogation, she was arrested (128, 153), and on June 3, 1975, an indictment⁷ was filed charging appellant with unlawfully converting to her own use \$470 received by her during the course of her employment as a postal clerk, in violation of 18 U.S.C. §1711.

At trial, the written statements made on April 7, 1975, were entered into evidence as part of the Government's direct case.

Appellant testified on her own behalf. During direct examination she denied taking any money for her own use (145). Further, she testified that the money in the envelope she gave to the postal inspectors on April 7, 1975, was money from her paycheck, not from her fixed credit, explaining that she put

⁷The indictment is B to appellant's separate appendix.

the money in the envelope⁸ because she knew her account was short and as a result of that shortage was afraid she would be accused of the theft of the registry letter (146-147). Moreover, appellant testified that on March 26, 1975, she discovered that her credit at Sunnyside was short, and later in March, found out about the shortage at the Steinway Post Office. Appellant denied knowing about the shortage in her third account until she was told about it by the inspectors during the April 7 interrogation (147). Additionally, she stated that she did not know how the shortages occurred, that she did not know the amount of the shortages until she "checked" her accounts at Sunnyside and Steinway, and that she never checked the Broadway account (148).

On cross-examination, appellant was again asked if she had done her own audit on March 26. Appellant answered that she had (165). Further, the Assistant U.S. Attorney elicited that appellant had not seen any formal audits performed, but had appellant describe the proper procedure for conducting an audit (168, 189-194). When asked how long it took appellant to complete an audit, appellant testified, "I really can't say" (168). The Assistant U.S. Attorney then questioned appellant at great length and in detail about any possible audits she had conducted (168-174). Specifically, the Assistant U.S. Attorney focused on the length of time appellant spent doing

⁸See footnote 6, supra, at 4.

an audit:

Q. To do this audit that you did on the 26th, how long did it take you to figure out your audit?

A. I don't know.

Q. Well, more than five minutes?

A. I can't say.

Q. More than ten minutes?

Where were you sitting when you took the audit?

A. At my window.

Q. Sitting at your window?

A. Not sitting, standing.

Q. Standing at your window. And you don't know -- did it take less than an hour?

A. Can't say because it was in between customers.

(174-175).

The Assistant U.S. Attorney returned to the subject again:

Q. Let's assume that you weren't going to be interrupted while taking the audit, how long do you think the audit would take?

A. I really don't know.

Q. Take more than a half hour?

A. I can't say.

Q. You've taken them before, haven't you?

A. It all depends upon what I have in my drawer.

Q. Have you ever taken an audit -- I'm sorry, you say it all depends what you have

in your drawer?

A. Sometimes I have stamps, sometimes I have less.

Q. What's the easiest way to take an audit?

A. There's no easy way, only one way.

Q. You said it all depends what you have in your drawer. Is it easier when you have cash in your drawer or easier when you have stamps?

A. No, it's the day -- let me explain. Some days I have less stamps because I turn in money at the end of the days for my stamps. It's easy that way because I have a receipt that I could count.

Q. How long does it take you to do that?

For the seventh time, appellant replied:

A. I don't know, I never counted. I can't say.

(186-187).

After the completion of the defense case, the Government, outside the jury's presence, announced its intention of recalling Postal Inspector Garafalo to testify how he accomplished the audit of appellant's three accounts and the length of time the audit took (211). Defense counsel objected, arguing that the amount of time involved in Garafalo's audit was irrelevant (212) and that rebuttal testimony used to contradict a matter elicited by the Government itself on cross-examination would be an abuse of the function of rebuttal evidence (214). Despite this objection, Inspector Garafalo testified.

The inspector stated that the Sunnyside audit took an hour to an hour and a half; the Steinway audit took about an hour; and the third, approximately an hour (216).

During summation, the Assistant U.S. Attorney argued from the fact that Inspector Garafalo was an experienced accountant and took one and one-half hours to do an audit, that appellant could not have done an audit, "that it would have taken her two days" (250-251).

After deliberations, appellant was found guilty as charged.

ARGUMENT

THE IMPROPER AND PREJUDICIAL REBUT- TAL TESTIMONY OF THE POSTAL INSPEC- TOR REQUIRES REVERSAL.

During her direct testimony, appellant was not questioned about how long it took her to check her fixed accounts. Indeed, appellant never indicated that she did a formal audit. On cross-examination by the Assistant U.S. Attorney, appellant testified seven times that she did not know the length of time it took her to complete her check. Despite this testimony, and over objection, Postal Inspector Garafalo was permitted to testify on rebuttal that his audits of appellant's accounts took a total of three hours. Because this rebuttal testimony was improper, reversal of the judgment is required.

The length of time which it took appellant to check her accounts was irrelevant to any substantive issue in the case.

[N]othing is better settled than that a witness, whether a party or not, may not be asked questions as to irrelevant matters on cross-examination for the purpose of contradicting his answers and thus discrediting.

United States v. Lawinski,
195 F.2d 1, 7 (7th Cir. 1952).

Cohen v. United States, 56 F.2d 28, 30 (1st Cir. 1932); United States v. Lambert, 463 F.2d 552, 557 (7th Cir. 1972); C.J.S., WITNESSES, §§484, 633; United States v. Masino, 275 F.2d 129, 133 (2d Cir. 1960); cf. United States v. Glasser, 443 F.2d 994,

1003 (2d Cir. 1971); compare United States v. Jansen, 475 F.2d 312, 316 (7th Cir. 1973).

This accepted rule was violated by the Assistant United States Attorney's cross-examination of appellant and Inspector Garafalo's rebuttal testimony. Here, the Assistant U.S. Attorney repeatedly asked appellant about the time necessary for her to complete the audits. This irrelevant information was improperly elicited for the purpose of contradicting it through Garafalo's testimony about how long he needed to complete his audits. Moreover, Garafalo's testimony that he took three hours to finish his audits is not probative of the time needed by appellant for her informal check.

Thus, this cross-examination of appellant for the purpose of contradiction by rebuttal testimony was improper. United States v. Lawinski, supra, 195 F.2d at 7; Cohen v. United States, supra, 56 F.2d at 30; United States v. Lambert, supra, 463 F.2d at 557; C.J.S., WITNESSES, 484, 633.

Moreover, appellant's cross-examination about the time necessary for an audit and its rebuttal by Garafalo's testimony was highly prejudicial. Not only did it improperly discredit appellant's credibility on a matter totally collateral to the issues at trial, but it was utilized by the Government further to rebut appellant's first statement entered as part of the Government's case-in-chief. On summation, the prosecutor argued that the rebuttal testimony indicated that appellant could not have done an audit on the auditors, as she had earlier indicated

in her first written statement (250-251). Thus, because the testimony was prejudicial, reversal is required. United States v. Lawinski, supra; Cohen v. United States, supra; United States v. Lambert, supra; C.J.S., WITNESSES, §§484, 633.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

May 7, 1976

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Jonathan J. Silberman